It follows that federal jurisdiction is not defeated by the Tax Injunction Act and the judgment of the Court of Appeals should therefore be affirmed.

KEY NUMBER SYSTEM

Bighorn River

450 U.S. 544, 67 L.Ed.2d 493

State of MONTANA et al., Petitioners,

v.

UNITED STATES et al.

No. 79–1128.

Argued Dec. 3, 1980.

Decided March 24, 1981.

Rehearing Denied June 1, 1981.

See 452 U.S. 911, 101 S.Ct. 3042.

The United States in its own right and as fiduciary on behalf of Crow Tribe of Indians sought to quiet title to the bed and banks of the Big Horn River. The United States District Court for the District of Montana, 457 F.Supp. 599, declared that the state of Montana owned the bed and banks of the Big Horn River. The Court of Appeals, Ninth Circuit, reversed and remanded, 604 F.2d 1162. On writ of certiorari, the Supreme Court, Justice Stewart, held that: (1) title to the bed of the Big Horn River passed to Montana upon its admission to the Union, and (2) the Crow Indian Tribe had no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.

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Judgment of Court of Appeals reversed, and case remanded.

Justice Blackmun filed an opinion dissenting in part, in which Justice Brennan and Justice Marshall joined.

Justice Stevens filed a concurring opinion.

1. Navigable Waters ⇐36(1)
Waters and Water Courses ⇐89

Owners of land riparian to nonnavigable streams may own adjacent riverbed, but conveyance by United States of land riparian to navigable river carries no interest in the riverbed, but, rather, ownership of land under navigable waters is incident of sovereignty.

2. Navigable Waters ⇐36(1)

As general principle, ownership of land under navigable waters is held in trust by federal government for future states, to be granted to such states when they enter Union and assume sovereignty on equal footing with established states.

3. Federal Courts ⇐430
Navigable Waters ⇐16

After state enters Union, title to land under navigable waters therein is governed by state law, subject to only one limitation, i. e., paramount power of the United States to ensure that such waters remain free for interstate and foreign commerce.

4. Navigable Waters ⇐37(2)

Congress may convey lands below high-water mark of navigable water, and so defeat title of a new state, in order to perform international obligations, or to effect improvement of such lands for promotion and convenience of commerce with foreign nations and among several states, or to carry out other public purposes appropriate to objects for which the United States holds the Territory. Treaty With the Crow Indians, Arts. I et seq., II, 15 Stat. 649; Treaty of Fort Laramie, 11 Stat. 749.

respecting hunting and fishing on the reservation, including Resolution No. 74–05, the occasion for this lawsuit. That resolution prohibits hunting and fishing within the reservation by anyone who is not a member of the Tribe. The State of Montana, however, has continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation.

On October 9, 1975, proceeding in its own right and as fiduciary for the Tribe, the United States endeavored to resolve the conflict between the Tribe and the State by filing the present lawsuit. The plaintiff sought (1) a declaratory judgment quieting title to the bed of the Big Horn River in the United States as trustee for the Tribe, (2) a declaratory judgment establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and (3) an injunction requiring Montana to secure the permission of the Tribe before issuing hunting or fishing licenses for use within the reservation.

The District Court denied the relief sought. 457 F.Supp. 599. In determining the ownership of the river, the court invoked the presumption that the United States does not intend to divest itself of its sovereign rights in navigable waters and reasoned that here, as in *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465, the language and circumstances of the relevant treaties were insufficient to rebut the presumption. The court thus concluded that the bed and banks of the river had remained in the ownership of the United States until they passed to Montana on its admission to the Union. As to the dispute over the regulation of hunting and fishing the court found that "[i]mplicit in the Supreme Court's decision in *Oliphant* [*v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209] is the recognition that Indian tribes do not have the power, nor do they have the authority to regulate non-Indians unless so granted by an act of Congress." 457 F.Supp., at 609. Because no treaty or Act of Congress gave the Tribe authority to regulate hunting or fishing by non-Indians, the court held that 1550 the Tribe could not exercise such authority except by granting or withholding authority to trespass on tribal or Indian land. All other authority to regulate non-Indian hunting and fishing resided concurrently in the State of Montana and, under 18 U.S.C. § 1165 (which makes it a federal offense to trespass on Indian land to hunt or fish without permission), the United States.

The Court of Appeals reversed the judgment of the District Court. 604 F.2d 1162. Relying on its opinion in *United States v. Finch*, 548 F.2d 822, vacated on other grounds, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048, the appellate court held that, pursuant to the treaty of 1868, the bed and banks of the river were held by the United States in trust for the Tribe. Relying on the treaties of 1851 and 1868, the court held that the Tribe could regulate hunting and fishing within the reservation by nonmembers, although the court noted that the Tribe could not impose criminal sanctions on those nonmembers. The court also held, however, that the two Allotment Acts implicitly deprived the Tribe of the authority to prohibit hunting and fishing on fee lands by resident non-member owners of those lands. Finally, the court held that nonmembers permitted by the Tribe to hunt or fish within the reservation remained subject to Montana's fish and game laws.

II

The respondents seek to establish a substantial part of their claim of power to control hunting and fishing on the reservation by asking us to recognize their title to the bed of the Big Horn River.[1] The ques-

1. According to the respondents, the Crow Tribe's interest in restricting hunting and fishing on the reservation focuses almost entirely on sports fishing and duck hunting in the waters and on the surface of the Big Horn River. The parties, the District Court, and the Court of Appeals have all assumed that ownership of the riverbed will largely determine the power to control these activities. Moreover, although the complaint in this case sought to

Question

1551 tion is whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868, and therefore continues to hold the land in trust for the use and benefit of the Tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627–628, 90 S.Ct. 1328, 1332–1333, 25 L.Ed.2d 615.

[1–5] Though the owners of land riparian to *nonnavigable* streams may own the adjacent riverbed, conveyance by the United States of land riparian to a *navigable* river carries no interest in the riverbed. *Packer v. Bird*, 137 U.S. 661, 672, 11 S.Ct. 210, 212, 34 L.Ed. 819; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 289, 19 L.Ed. 74; 33 U.S.C. § 10; 43 U.S.C. § 931. Rather, the ownership of land under navigable waters is an incident of sovereignty. *Martin v. Waddell*, 16 Pet. 367, 409–411, 10 L.Ed. 997. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. *Pollard's Lessee v. Hagan*, 3 How. 212, 222–223, 229, 11 L.Ed. 565. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce. *United States v. Oregon*, 295 U.S. 1, 14, 55 S.Ct. 610, 615, 79 L.Ed. 1267. It is now established, however, that Congress may sometimes convey lands below the high-water mark of a navigable water,

> "[and so defeat the title of a new State,] in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively v. Bowlby*, 152 U.S. 1, 48, 14 S.Ct. 548, 566, 38 L.Ed. 331.

1552 But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon, supra*, at 14, 55 S.Ct., at 615, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." *United States v. Holt State Bank*, 270 U.S., at 55, 46 S.Ct., at 199. See also *Shively v. Bowlby, supra*, at 48, 14 S.Ct., at 566. A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, *United States v. Oregon, supra*, at 14, 55 S.Ct., at 615, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," *United States v. Holt State Bank, supra*, 270 U.S., at 55, 46 S.Ct., at 199, or was rendered "in clear and especial words," *Martin v. Waddell, supra*, at 411, or "unless the claim confirmed in terms embraces the land under the waters of the stream," *Packer v. Bird, supra*, at 672, 11 S.Ct., at 212.[2]

In *United States v. Holt State Bank, supra*, this Court applied these principles to reject an Indian Tribe's claim of title to the bed of a navigable lake. The lake lay wholly within the boundaries of the Red Lake Indian Reservation, which had been created by treaties entered into before Minnesota joined the Union. In these treaties the United States promised to "set apart and withhold from sale, for the use of" the

quiet title only to the bed of the Big Horn River, we note the concession of the United States that if the bed of the river passed to Montana upon its admission to the Union, the State at the same time acquired ownership of the banks of the river as well.

2. Congress was, of course, aware of this presumption once it was established by this Court. See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588, 97 S.Ct. 1361, 1363, 51 L.Ed.2d 660.

Chippewas, a large tract of land, Treaty of Sept. 30, 1854, 10 Stat. 1109, and to convey "a sufficient quantity of land for the permanent homes" of the Indians, Treaty of Feb. 22, 1855, 10 Stat. 1165. See *Minnesota v. Hitchcock*, 185 U.S. 373, 389, 22 S.Ct. 650, 656, 46 L.Ed. 954.[3] The Court concluded that there was nothing in the treaties "which even approaches a grant of rights in lands underlying navigable waters; nor 1553 anything evincing a purpose to depart from the established policy ... of treating such lands as held for the benefit of the future State." *United States v. Holt State Bank*, 270 U.S., at 58–59, 46 S.Ct., at 200. Rather, "[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." *Id.*, at 58, 46 S.Ct., at 200.

[6, 7] The Crow treaties in this case, like the Chippewa treaties in *Holt State Bank*, fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty. The 1851 treaty did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories. Treaty of Fort Laramie, 1851, Art. 5, 2 Kappler 594–595. It referred to hunting and fishing only insofar as it said that the Crow Indians "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described," a statement that had no bearing on ownership of the riverbed. By contrast, the 1868 treaty did expressly convey land to the Crow Tribe. Article II of the treaty described the reservation land in detail[4] and stated that such land would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named...." Second Treaty of Fort Laramie, May 7, 1868, Art. II, 15 Stat. 650. The treaty then stated:

> "[T]he United States now solemnly agrees that no persons, except those herein designated and authorized to do so, 1554 and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians...." *Ibid.*

Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed. The treaty in no way expressly referred to the riverbed, *Packer v. Bird*, 137 U.S., at 672, 11 S.Ct., at 212, nor was an intention to convey the riverbed expressed in "clear and especial words," *Martin v. Waddell*, 16 Pet., at 411, or "definitely declared or otherwise made very plain," *United States v. Holt State Bank*, 270 U.S., at 55, 46 S.Ct., at 199. Rather, as in *Holt*, "[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." *Id.*, at 58, 46 S.Ct., at 200.

Though Article 2 gave the Crow Indians the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it, the respondents' reliance on that provision simply begs the question of the precise extent of the conveyed lands to which this exclusivity attaches. The mere fact that the bed of a 1555

3. The *Hitchcock* decision expressly stated that the Red Lake Reservation was "a reservation within the accepted meaning of the term." 185 U.S., at 389, 22 S.Ct., at 656.

4. "[C]ommencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning...." Second Treaty of Fort Laramie, May 7, 1868, Art. II, 15 Stat. 650.

navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance. In the Court of Appeals' *Finch* decision, on which recognition of the Crow Tribe's title to the riverbed rested in this case, that court construed the language of exclusivity in the 1868 treaty as granting to the Indians all the lands, including the riverbed, within the described boundaries. *United States v. Finch,* 548 F.2d, at 829. Such a construction, however, cannot survive examination. As the Court of Appeals recognized, *ibid.*, and as the respondents concede, the United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed. Therefore, such phrases in the 1868 treaty as "absolute and undisturbed use and occupation" and "no persons, except those hereinafter designated ... shall ever be permitted," whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries. Thus, even if exclusivity were the same as ownership, the treaty language establishing this "right of exclusivity" could not have the meaning that the Court of Appeals ascribed to it.[5]

Moreover, even though the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby,* 152 U.S., at 48, 14 S.Ct., at 566, justifying a congressional conveyance of a riverbed, see, *e. g., Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 85, 39 S.Ct. 40, 63 L.Ed. 138, the situation of the Crow Indians at the time of the

5. In one recent case, *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615, this Court did construe a reservation grant as including the bed of a navigable water, and the respondents argue that this case resembles *Choctaw Nation* more than it resembles the established line of cases to which *Choctaw Nation* is a singular exception. But the finding of a conveyance of the riverbed in *Choctaw Nation* was based on very peculiar circumstances not present in this case.

Those circumstances arose from the unusual history of the treaties there at issue, a history which formed an important basis of the decision. *Id.* at 622–628, 90 S.Ct., at 1330–1333. Immediately after the Revolutionary War, the United States had signed treaties of peace and protection with the Cherokee and Choctaw Tribes, reserving them lands in Georgia and Mississippi. In succeeding years the United States bought large areas of land from the Indians to make room for white settlers who were encroaching on tribal lands, but the Government signed new treaties guaranteeing that the Indians could live in peace on those lands not ceded. The United States soon betrayed that promise. It proposed that the Tribes be relocated in a newly acquired part of the Arkansas Territory, but the new territory was soon overrun by white settlers, and through a series of new cession agreements the Indians were forced to relocate farther and farther west. Ultimately, most of the Tribes' members refused to leave their eastern lands, doubting the reliability of the Government's promises of the new western land, but Georgia and Mississippi, anxious for the relocation westward so they could assert jurisdiction over the Indian lands, purported to abolish the Tribes and distribute the tribal lands. The Choctaws and Cherokees finally signed new treaties with the United States aimed at rectifying their past suffering at the hands of the Federal Government and the States.

Under the Choctaw treaty, the United States promised to convey new lands west of the Arkansas Territory in fee simple, and also pledged that "no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation ... and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333–334, quoted in *Choctaw Nation v. Oklahoma,* 397 U.S., at 625, 90 S.Ct., at 1331. In 1835, the Cherokees signed a treaty containing similar provisions granting reservation lands in fee simple and promising that the tribal lands would not become part of any State or Territory. *Id.*, at 626, 90 S.Ct., at 1332. In concluding that the United States had intended to convey the riverbed to the Tribes before the admission of Oklahoma to the Union, the *Choctaw* Court relied on these circumstances surrounding the treaties and placed special emphasis on the Government's promise that the reserved lands would never become part of any State. *Id.*, at 634–635, 90 S.Ct., at 1336. Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868.

treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. See *Shively v. Bowlby, supra,* at 48, 14 S.Ct., at 566. As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life. 1 App. 74. Cf., *Alaska Pacific Fisheries v. United States, supra,* at 88, 39 S.Ct., at 41; *Skokomish Indian Tribe v. France,* 320 F.2d 205, 212 (CA9).

[8] For these reasons, we conclude that title to the bed of the Big Horn River
1557 passed to the State of Montana upon its admission into the Union, and that the Court of Appeals was in error in holding otherwise.

III

[9] Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the reservation, the regulatory issue before us is a narrow one. The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, 604 F.2d, at 1165–1166, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. *Ibid.* What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. The Court of Appeals held that, with respect to fee-patented lands, the Tribe may regulate, but may not prohibit, hunting and fishing by non-member resident owners or by those, such as tenants or employees, whose occupancy is authorized by the owners. *Id.,* at 1169. The court further held that the Tribe may totally prohibit hunting and fishing on lands within the reservation owned by non-Indians who do not occupy that land. *Ibid.*

The Court of Appeals found two sources for this tribal regulatory power: the Crow treaties, "augmented" by 18 U.S.C. § 1165, and "inherent" Indian sovereignty. We believe that neither source supports the court's conclusion.

A

[10] The purposes of the 1851 treaty were to assure safe passage for settlers across the lands of various Indian Tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber, and forage; to delineate tribal boundaries; to promote intertribal peace; and to establish a way of identifying Indians who commit- 1558
ted depredations against non-Indians. As noted earlier, the treaty did not even create a reservation, although it did designate tribal lands. See *Crow Tribe v. United States,* 284 F.2d 361, 364, 366, 368, 151 Ct.Cl. 281, 285–286, 289, 292–293. Only Article 5 of that Treaty referred to hunting and fishing, and it merely provided that the eight signatory tribes "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 2 Kappler 595.[6] The treaty nowhere suggested that Congress intended to grant authority to the Crow Tribe to regulate hunting and fishing by nonmembers on nonmember lands. Indeed, the Court of Appeals acknowledged that after the treaty was signed non-Indians, as well as members of other Indian tribes, undoubtedly hunted and fished within the treaty-designated territory of the Crows. 604 F.2d, at 1167.

[11, 12] The 1868 Fort Laramie Treaty, 15 Stat. 649, reduced the size of the Crow territory designated by the 1851 treaty.

6. The complaint in this case did not allege that non-Indian hunting and fishing on reservation lands has impaired this privilege.

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of the Crow Reservation, including upon the Big Horn River, that they believe are inconsistent with their true rights, which, to some extent, they claim rest upon the aboriginal title of the Crows.

The position of the State of Montana, on the other hand, is that the district court's judgment correctly reflects the holdings of both the Supreme Court and this court (to the extent not set aside by the Supreme Court) and that, to the extent the judgment might go beyond the letter of these prior holdings, its terms are required either by the law of the case, collateral estoppel, res judicata, or stare decisis.

The present record of this case does not permit us to rule definitively upon the contentions of the parties. Completely lacking is a full development of the legal basis of the claims now put forward by the Crow Tribe and the United States and a clear enunciation of the scope of these rights. While under ordinary circumstances we might penalize this imprecision by affirming the judgment below, we are reluctant to follow this course when, as in this case, the principal focus of prior proceedings differs significantly from that presently being urged. Previously, the focus of the litigation was upon the title to the bed and banks of the Big Horn River and the rights of the Tribal Council of the Crows to regulate hunting and fishing by non-members within the exterior limits of the Crow Reservation. Now, as indicated above, the concern of the Tribe and the United States is with the nature and extent of the hunting and fishing rights of members of the Crow Tribe. Under these circumstances it is premature for us to determine what these rights might have been before this litigation and the effect, if any, of the decisions of the Supreme Court and this court on such rights.

We have concluded that the contribution we best can make toward expediting the resolution of this litigation is to set forth what we consider to have been the explicit holdings of the Supreme Court and those of this court not overturned by the Supreme Court. An enumeration of these holdings will permit the district court on remand to hear such claims as the Crows and the United States might assert and determine whether such claims, to any extent, have survived prior decisions.

The explicit holdings of the Supreme Court in *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), and of this court in *United States v. State of Montana*, 604 F.2d 1162 (9th Cir. 1979), to the extent not reversed by the Supreme Court, are as follows:

1. The Crow Tribe can proscribe all hunting and fishing by non-members on those lands described in 18 U.S.C. § 1165. *Montana v. United States*, 450 U.S. at 557, 101 S.Ct. at 1254.

2. The Crow Tribe, within 18 U.S.C. § 1165 lands, has power to regulate hunting and fishing by non-members of the tribe (whether Indian or non-Indian) subject to the following conditions:

   (a) That the Crow Tribe lacks the power to impose criminal sanctions on non-Indians who violate its hunting and fishing regulations,

   (b) That the exercise by the Crow Tribe of its power to regulate hunting and fishing by non-Indians must be within the constraints recognized by this court in *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976). *Montana v. United States*, 450 U.S. at 557, 101 S.Ct. at 1254; *United States v. Montana*, 604 F.2d at 1165, 1170.

3. The title to the bed and banks of the Big Horn is in the State of Montana. 450 U.S. at 556–57, 101 S.Ct. at 1253–54.

4. The Crow Tribe has no power to regulate hunting and fishing by non-members on non-member owned fee patent land located within the exterior boundaries of the Crow Reservation. *Id.* at 557, 101 S.Ct. at 1254.

5. The State of Montana cannot regulate hunting and fishing by members of the Crow Tribe within 18 U.S.C. § 1165 lands. 604 F.2d at 1172.

6. The State of Montana has the power to regulate hunting and fishing by non-members of the Crow Tribe within the exterior boundaries of the Crow Reservation subject to the following limitations: